

3-21-2014

# Lopez v. State Respondent's Brief Dckt. 40822

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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

DAMON MARCELINO LOPEZ,	)	
	)	No. 40822
Petitioner-Appellant,	)	
	)	Canyon Co. Case No.
vs.	)	CV-2011-5914
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF CANYON

HONORABLE BRADLY S. FORD  
District Judge

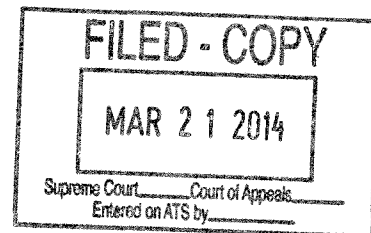
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PETITIONER-APPELLANT

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## STATEMENT OF THE CASE

### Nature Of The Case

Damon Marcelino Lopez appeals from the denial, following an evidentiary hearing, of his petition for post-conviction relief. On appeal, he argues that the district court erred by denying his petition for post-conviction relief and that the Idaho Supreme Court violated his right to counsel by allowing his appellate attorney to withdraw.

### Statement Of The Facts And Course Of The Proceedings

The factual background and procedural history of this case, as related by the district court, are as follows:

On December 3, 2009, the Petitioner was charged by Superceding [sic] Indictment with Sexual Battery of a Minor Child Sixteen or Seventeen Years, a felony, a violation of Idaho Code 18-1508A. Lopez was charged by Part II Superceding [sic] Indictment with Persistent Violator, pursuant to Idaho Code 19-2514. On April 23, 2010, Lopez entered a plea of guilty to the Sexual Battery offense and the Persistent Violator charge was dismissed. On May 11, 2010, Lopez's attorney Marco DeAngelo filed a Motion to Withdraw as Counsel and the court entered the Order Allowing Attorney to Withdraw on May 14, 2010. Lopez was appointed a Public Defender at that time. A sentencing hearing was scheduled for July 12, 2010 which was held but sentencing was continued to the following day to allow the defendant additional time to review and consider the information in the Pre-Sentence Investigation and related evaluations. Sentencing was held on July 13, 2010. The Judgment and Commitment was filed on July 22, 2010. The defendant was sentenced by this court to a total unified sentence of twenty-eight (28) years consisting of a fixed sentence of seven (7) years followed by an indeterminate sentence of twenty-one (21) years. That sentence was ordered to be run concurrently with Lopez's parole violation. He was granted credit for two hundred thirty-two (232) days.

On September 16, 2010, the defendant filed a *pro se* Motion for Correction or Reduction of Sentence, ICR 35. On September 22, 2010, the court issued an Order Appointing Attorney. The State filed an

Objection on October 1, 2010. On February 8, 2011, the court heard oral argument on the Rule 35 motion. Lopez was present and represented by Alexa Perkins, Canyon County Public Defender. The Order Denying Motion for Reduction of Sentence Pursuant to I.C.R. 35 was filed on March 25, 2011. The court, having reviewed the criminal file and ISTARS, does not find that Lopez appealed any of the decisions of this court prior to filing his Petition for Post-Conviction Relief.

(R., p.141-42.)

Lopez filed a petition for post-conviction relief, alleging that his various attorneys were ineffective for not spending adequate time with him to prepare his case or discuss viable defenses, not informing him in regards to his Estrada<sup>1</sup> rights, and not obtaining favorable information for sentencing. (R., pp.3-9; 50-53.) The district court ultimately held an evidentiary hearing on the petition. (R., pp.116-20.) The district court also gave the parties the opportunity to submit closing memoranda. (R., pp.121-28.) The district court determined that Lopez failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel and so denied his petition for post-conviction relief. (R., pp.140-62.)

Lopez filed a timely notice of appeal. (R., pp.164-67.) Lopez also requested and was appointed appellate counsel through the State Appellate Public Defender. (R., pp.168-70). After reviewing the record and determining that there was no viable issue to appeal, appointed counsel moved to withdraw. (Motion for Leave to Withdraw and to Suspend the Briefing Schedule, filed September 26, 2013 (hereinafter "Motion")). The Idaho Supreme Court granted the motion to withdraw. (Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule, filed October 22, 2013 (hereinafter "Order").)

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<sup>1</sup> Estrada v. State, 143 Idaho 558, 149 P.3d 833 (2006).

## ISSUES

Lopez states the issues on appeal as:

Did The District Court Err When It Dismissed The Petition For Post Conviction Relief?

Has The Appellant Been Denied Due Process Of Law By The Court Ordering That He Had No Right To Counsel During A Critical Stage Of The Proceedings?

Has The Appellant Been Denied His Right To The Effective Assistance Of Counsel?

Has The Appellant Been Denied His Right To Have The Assistance Of Counsel To Bring Forward This Appeal?

(Appellant's brief, p.II.)

The state rephrases the issues as:

1. Has Lopez failed to show that he has a right to counsel to pursue a frivolous appeal from the denial of a post-conviction petition?
2. Has Lopez failed to show error in the denial, following an evidentiary hearing, of his petition for post-conviction relief?



## ARGUMENT

### I.

#### The Idaho Supreme Court Did Not Violate Lopez's Right To Counsel By Allowing His Appellate Counsel To Withdraw

##### A. Introduction

Below, Lopez requested and was appointed counsel for his petition for post-conviction relief. (R., pp.10-13, 19-20.) Following an evidentiary hearing, the district court denied Lopez's post-conviction petition (R., pp.140-62) and Lopez appealed (R., pp.164-67). Lopez requested and was appointed appellate counsel. (R., pp.168-70.) However, after reviewing the record and determining that there was no viable issue to appeal, appointed counsel moved to withdraw. (Motion.) The Idaho Supreme Court granted the motion to withdraw. (Order.) On appeal, Lopez argues that the Idaho Supreme Court violated his constitutional right to counsel. (Appellant's brief, pp.11-12.) Application of the correct legal standards, however, demonstrates that Lopez has failed to establish a violation of his constitutional rights.

##### B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. If This Case Is Assigned To The Idaho Court Of Appeals, Lopez Has Failed To Provide Any Basis For The Court To Reconsider The Idaho Supreme Court's Order Granting Counsel's Motion To Withdraw

In State v. Morgan, 153 Idaho 618, 288 P.3d 835 (Ct. App. 2012), the Idaho Court of Appeals considered a claim that the Idaho Supreme Court denied the appellant his constitutional rights by denying a motion made prior to assignment of the case. In doing so, the Court “disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law.” Id. at 620, 288 P.3d at 837. Such an undertaking, the Court explained, “would be tantamount to the Court of Appeals entertaining an ‘appeal’ from an Idaho Supreme Court decision and is plainly beyond the purview of this Court.” Id. In the event that this case is assigned to the Court of Appeals, Lopez’s arguments fail to provide any basis for the Court to reconsider the Idaho Supreme Court’s order allowing appellate counsel to withdraw.

D. Even On The Merits, Lopez Has Failed To Show Any Entitlement To Counsel On This Appeal

Even if this Court considers the merits of Lopez’s claim, his assertion still fails. There is no constitutional right to appointed counsel in post-conviction proceedings, whether in the trial court or on appeal. See Pennsylvania v. Finley, 481 U.S. 551, 555 (1987) (the right to counsel extends only to criminal trial proceedings, the defendant’s “first appeal as of right, and no further”). Contrary to Lopez’s arguments, therefore, the Idaho Supreme Court did not violate his constitutional rights by allowing his appellate counsel to withdraw.

Indigent petitioners are accorded a statutory right

to be represented in any other post-conviction or post-commitment proceeding that the attorney or the needy person considers appropriate, unless the court in which the proceeding is brought determines that it is not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense and is therefore a frivolous proceeding.

I.C. § 19-852(b)(3). In requesting to withdraw, Lopez's appointed appellate counsel explained that after reviewing the appellate record, counsel was unable to find a single viable issue to appeal. (Memorandum in Support of Motion, pp.4-6.) The Idaho Supreme Court implicitly agreed with appellate counsel that Lopez's appeal was frivolous when it granted counsel's motion to withdraw. (Order.) For the reasons set forth below in section II, Lopez's appeal is without merit and the Supreme Court correctly granted appellate counsel's motion.

There is no constitutional right to counsel; therefore, contrary to his claims on appeal, Lopez was not deprived of his constitutional right to counsel. Lopez was also not deprived of his statutory right to counsel because his appeal from the denial, after an evidentiary hearing, of his petition for post-conviction relief is frivolous. Lopez has failed to show that his right to counsel was violated.

## II.

### Lopez Has Failed To Show Error In The District Court's Denial, After An Evidentiary Hearing, Of His Petition For Post-Conviction Relief

#### A. Introduction

Following an evidentiary hearing, the district court determined that Lopez failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel and so denied his petition for post-conviction relief. (R., pp.140-60.) On

appeal, Lopez contends that he proved ineffective assistance of counsel and so should have been granted post-conviction relief. (Appellant's brief, pp.2-10.) Application of the correct legal standards to Lopez's claim, however, shows that he failed to prove that his attorneys were ineffective. The district court therefore properly denied Lopez's petition for post-conviction relief.

B. Standard Of Review

Because proceedings under the Post-Conviction Procedure Act are civil, where there is competent and substantial evidence to support a decision made after an evidentiary hearing on an application for post-conviction relief, that decision will not be disturbed on appeal. Odom v. State, 121 Idaho 625, 826 P.2d 1337 (Ct. App. 1992).

C. The District Court Correctly Denied Lopez's Post-Conviction Petition

A petitioner seeking post-conviction relief has the burden of proving, by a preponderance of the evidence, the allegations on which the claim is based. I.C.R. 57(c); McKay v. State, 148 Idaho 567, 570, 225 P.3d 700, 703 (2010). At an evidentiary hearing, the credibility of witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence are all matters within the province of the trial court. Larkin v. State, 115 Idaho 72, 73, 764 P.2d 439, 440 (Ct. App. 1988). The district court's factual findings will not be disturbed if "supported by substantial, even if conflicting, evidence in the record." Martinez v. State, 125 Idaho 844, 846, 875 P.2d 941, 943 (Ct. App. 1994) (citing Holmes v. State, 104 Idaho 312, 658 P.2d 983 (1983)). On review of an order denying post-conviction relief, the lower court's decision that the burden of proof has not been met is entitled to great weight, and a finding that a party

has failed to prove his claim will not be set aside unless that finding is clearly erroneous. Larkin, 115 Idaho at 74, 764 P.2d at 441.

Lopez asserted in his petitions that his attorneys were ineffective, alleging that they were inadequately prepared, failed to inform him of his Estrada rights, and failed to obtain favorable information for sentencing. (R., p.5, 50-53.) Where the petitioner alleges entitlement to relief based upon ineffective assistance of counsel, he must show that his attorney's performance was objectively deficient and that he was prejudiced by that deficiency. Strickland v. Washington, 466 U.S. 668, 687-88 (1984); Aragon v. State, 114 Idaho 758, 760-61, 760 P.2d 1174, 1176-77 (1988). To show deficient performance, the petitioner must "overcome the strong presumption that counsel's performance was adequate by demonstrating 'that counsel's representation did not meet objective standards of competence.'" Vick v. State, 131 Idaho 121, 124, 952 P.2d 1257, 1260 (Ct. App. 1998) (quoting Roman v. State, 125 Idaho 644, 648-49, 873 P.2d 898, 902-03 (Ct. App. 1994)). Appellate courts "will not second guess counsel without evidence of inadequate preparation, ignorance of the relevant law, or other shortcomings capable of objective evaluation." State v. Chapman, 120 Idaho 466, 469-470, 816 P.2d 1023, 1026-27 (Ct. App. 1991) (citations omitted). When the alleged deficiency involves counsel's advice in relation to a guilty plea, "in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 58 (1985) (footnote and citations omitted). "Moreover, to obtain relief on this type of claim, a petitioner must convince the court that a decision to reject the plea bargain would have been rational under the

circumstances.” Padilla v. Kentucky, 559 U.S. \_\_\_, 130 S.Ct. 1473, 1485 (2010) (citation omitted).

In its “Order Denying Petition for Post-Conviction Relief,” the district court articulated the applicable legal standards, made detailed factual findings, and explained the reasons Lopez failed to prove by a preponderance of the evidence that he received ineffective assistance of counsel. (See R., pp.140-60.) The state adopts as part of its argument on appeal the district court’s reasoning for its denial, as set forth at pages 5-21 of its order, a copy of which is attached hereto as “Appendix A.”

On appeal, Lopez also argues that his attorney was ineffective for failing to file an appeal. (Appellant’s brief, pp.4-7.) Though this issue does not appear to be included in Lopez’s amended post-conviction petition, it was addressed during the evidentiary hearing and the district court discussed it in its order denying post-conviction relief. (Compare R., pp.50-53, with pp.157-60.)

To establish an objective deficiency in the context of a claim that trial counsel was ineffective for failing to file a notice of appeal, the petitioner must show either that (1) the attorney failed to follow his express instructions to file an appeal, or (2) the attorney failed to consult with him and (a) a rational defendant would want to appeal (based on nonfrivolous grounds), or (b) this particular defendant reasonably demonstrated to counsel that he was interested in appealing. Roe v. Flores-Ortega, 528 U.S. 470, 477-80 (2000). To establish prejudice, a petitioner must demonstrate that, but for counsel’s deficient conduct, he would have appealed. Id. at 486.

On appeal, Lopez abandons his original claim that his attorney failed to inform him of his right to appeal (see R., p.8) and instead argues that his attorney failed to

follow his express instructions to file an appeal (Appellant's brief, pp.4-7). The United States Supreme Court has explained:

If counsel has consulted with the defendant, the question of deficient performance is easily answered: Counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal.

Flores-Ortega, 528 U.S. at 478. Lopez claims that he sent a letter to his attorney instructing him to file an appeal. (Appellant's brief, pp.4-6.) Whether Lopez actually sent such a letter was disputed at the evidentiary hearing. (See Tr., p.29, L.19 – p.31, L.12.) Trial counsel did not recall receiving a letter from Lopez and there was no letter from Lopez in his file, which should have been the case if a letter was in fact received. (Tr., p.30, L.23 – p.31, L.12.)

Lopez argues that because no one proved conclusively that he did not send a letter instructing his attorney to file an appeal, the district court erred by denying this claim. (Appellant's brief, p.6.) This misconstrues the burden of proof. Lopez had the burden to produce evidence to prove his claim by a preponderance of the evidence. See McKay, 148 Idaho at 570, 225 P.3d at 703. Lopez failed to carry this burden. At best, whether Lopez sent a letter was disputed, and the weighing of disputed evidence, and attendant credibility determinations, are the province of the trial court. Larkin, 115 Idaho at 73, 764 P.2d at 440. After weighing the disputed evidence, the trial court determined that Lopez failed to prove that he sent a letter requesting his attorney to file an appeal. (R., pp.158-60.)

The district court's determination that Lopez failed to prove by a preponderance of the evidence that his attorney rendered ineffective assistance of counsel is supported

by the evidence presented below. The district court's order denying Lopez's petition for post-conviction relief should be affirmed.

#### CONCLUSION

The state respectfully requests that this Court affirm the district court's order denying Lopez's post-conviction petition.

DATED this 21st day of March, 2014.



RUSSELL J. SPENCER  
Deputy Attorney General

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 21st day of March, 2014, served two true and correct copies of the attached BRIEF OF RESPONDENT by placing two copies in the United States mail, postage prepaid, addressed to:

Damon Marcelino Lopez  
IDOC #58841  
ISCI  
PO Box 14  
Boise, ID 83707



RUSSELL J. SPENCER  
Deputy Attorney General

RJS/pm



## APPENDIX A



Conference was held on August 6, 2012. On August 30, 2012, the Petitioner filed a Motion for Judicial Notice.

The Evidentiary Hearing was held on October 24, 2012. The Petitioner was present and represented by attorney Elizabeth Allen. The Petitioner called Marco DeAngelo, William Schwartz, and Rick Cedillo as witnesses. The Petitioner also testified on his own behalf. The State did not call any witnesses. The court did grant the Petitioner's request to take judicial notice pursuant to Idaho Rule of Evidence 201. Following the hearing, the court allowed the parties additional time to submit written closing arguments. The Petitioner's Closing Argument was filed on November 27, 2012. The State's Response to Petitioner's Closing Argument was filed on December 3, 2012.

**Procedural History for Underlying Criminal Case CR-2009-38708**

On December 3, 2009, the Petitioner was charged by Superceding Indictment with Sexual Battery of a Minor Child Sixteen or Seventeen Years, a felony, a violation of Idaho Code 18-1508A. Lopez was charged by Part II Superceding Indictment with Persistent Violator, pursuant to Idaho Code 19-2514. On April 23, 2010, Lopez entered a plea of guilty to the Sexual Battery offense and the Persistent Violator charge was dismissed. On May 11, 2010, Lopez's attorney Marco DeAngelo filed a Motion to Withdraw as Counsel and the court entered the Order Allowing Attorney to Withdraw on May 14, 2010. Lopez was appointed a Public Defender at that time. A sentencing hearing was scheduled for July 12, 2010 which was held but sentencing was continued to the following day to allow the defendant additional time to review and consider the information in the Pre-Sentence Investigation and related evaluations. Sentencing was held on July 13, 2010. The Judgment and Commitment was filed on July 22, 2010. The defendant was sentenced by this court to a total unified sentence of twenty-eight (28) years consisting of a

fixed sentence of seven (7) years followed by an indeterminate sentence of twenty-one (21) years. That sentence was ordered to be run concurrently with Lopez's parole violation. He was granted credit for two hundred thirty-two (232) days.

On September 16, 2010, the defendant filed a *pro se* Motion for Correction or Reduction of Sentence, ICR 35. On September 22, 2010, the court issued an Order Appointing Attorney. The State filed an Objection on October 1, 2010. On February 8, 2011, the court heard oral argument on the Rule 35 motion. Lopez was present and represented by Alexa Perkins, Canyon County Public Defender. The Order Denying Motion for Reduction of Sentence Pursuant to I.C.R. 35 was filed on March 25, 2011. The court, having reviewed the criminal file and ISTARS, does not find that Lopez appealed any of the decisions of this court prior to filing his Petition for Post-Conviction Relief.

#### **Standard of Review**

An application for post-conviction relief initiates a proceeding which is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct.App.1992). However, an application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than a "short and plain statement of the claim". It must be verified with respect to facts within the personal knowledge of the applicant. Further, affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting the allegations, or the application will be subject to dismissal. *Id.* An application for post-conviction relief may be filed at any time within one year from the expiration of the time for

appeal or from the determination of proceedings following an appeal. I.C. § 19-4902. The court finds that Leonard's petition was timely filed.

Idaho Code § 19-4906 authorizes summary disposition of an application for post-conviction relief either pursuant to the motion of a party or upon the court's own initiative. Summary dismissal is the procedural equivalent of summary judgment under I.R.C.P. 56. *Cowger v. State*, 132 Idaho 681, 684 (Ct. App. 1999). It is appropriate only when the applicant's evidence has raised no genuine issues of material fact that if resolved would entitle the applicant to relief. *Id.* If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763 (Ct. App. 1991). However if there is no material issue of fact the court can, on its own motion, dismiss without a hearing. I.C. § 19-4906(b). As noted above, the court denied the State's Motion for Summary Dismissal finding that there were issues of fact to be resolved at an evidentiary hearing.

Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67 (Ct. App. 1990). It is within the province of the trial court to evaluate the credibility of witness and the weight to be given to their testimony as well as to determine what inferences are to be drawn from the evidence before the court. *Mendiola v. State*, 150 Idaho 345, 247 P.3d 210 (Ct. App. 2010), *review denied*.

#### Petition for Post-Conviction Relief

As noted above the Petitioner filed a *pro se* Petition. In that petition, Lopez asserts claims of ineffective assistance of counsel. In the Amended Petition, Lopez again asserts the Ineffective Assistance of Counsel claims. Specifically, he asserts that counsel did not spend adequate time with him to prepare for the case and to discuss possible defenses, did not inform

him of his Fifth Amendment and *Estrada* rights related to the psychosexual evaluation, and failed to contact Probation and Parole to obtain favorable information about Lopez prior to sentencing. Lopez also asserts that his counsel did not inform him of his right to appeal the decisions of this court.

In an Ineffective Assistance of Counsel claim, a defendant must satisfy the two prong test that: 1) his counsel's performance fell below an objective standard of reasonableness, and 2) there is a reasonable probability that, but for counsel's errors, the results of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-688 (1984). The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Id* at 686. See *State v. Charboneau*, 116 Idaho 129, 137, *cert denied*, 493 U.S. 922 (1989); see also *Gibson v. State*, 110 Idaho 631 (1986); *Paradis v. State*, 110 Idaho 534 (1986); *Carter v. State*, 108 Idaho 788 (1985). To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient, and that the defendant was prejudiced by the deficiency. *Jakoski v. State*, 136 Idaho 280, 284 (Ct. App. 2001). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760 (1988). To establish prejudice, the applicant must show a reasonable probability that, but for the attorney's deficient performance, the outcome of the trial would have been different. *Id* at 761. The Idaho Supreme Court has stated that the strategic and tactical decisions made by trial counsel are not a basis for an ineffective assistance of counsel claim unless a showing can be made that such decisions arose out of a lack of preparation, ignorance of relevant law, or other shortcomings capable of objective review. *State v. Shackelford*, 150 Idaho

355, \_\_\_, 247 P.3d 582, 610 (2010). Because there is a strong presumption that an attorney's performance falls within "the wide range of professional assistance" the burden is on the defendant to show a "reasonable probability" that a different result was likely and that prejudice resulted from counsel's actions. *Id.* When a defendant has been convicted upon a plea of guilty, the defendant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial in order to satisfy the prejudice prong. *Hoffman v. State*, 277 P.3d 1050, 1054-55 (Idaho Ct. App. 2012).

#### Preparation and Conduct of Trial Counsel

The first claim asserted by the Petitioner is that his counsel did not spend an adequate amount of time with the Petitioner and that he was thus prejudiced. Petitioner does not identify which counsel this argument is directed to and the record of this case indicates that Lopez was represented by the Canyon County Public Defender's Office, then he was represented by Mr. DeAngelo, and then he was represented again by the Canyon County Public Defender's Office. The only evidence admitted into the record relates to the actions of Mr. DeAngelo prior to and during the change of plea process and the actions of Mr. Schwartz as to the pre-sentence and sentencing process.

Marco DeAngelo

The court notes that on December 18, 2009 the court scheduled a criminal jury trial for April 27, 2010. As to Mr. DeAngelo, the record shows that a Pre-Trial Conference was held on April 5, 2010 and the court was informed at that time that Lopez had hired Mr. DeAngelo to represent him in place of the Public Defender. Mr. DeAngelo was not present at that hearing due to a scheduling conflict so the court set a continued Pre-Trial Conference hearing for the following day. On April 6, 2010, Mr. DeAngelo appeared with Lopez, obtained the discovery

from the Public Defender, and participated in the preparation of the Pre-Trial Memorandum. Mr. DeAngelo testified that after receiving the discovery that day, he spent the afternoon and evening reviewing the discovery and all of the audio recordings. He testified that he probably spent ten (10) to twelve (12) hours doing this work. He then testified that he went to the Canyon County Jail on April 7, 2010 and spent about an hour with Lopez reviewing the case. He then testified that he went back to the jail on April 15, 2010 and spent about thirty (30) minutes with Lopez. Finally, he testified that on April 23, 2010, the day of the scheduled Status Conference, he went to court early in order to assist Lopez in completing the change of plea form required by the court. He testified that it was his belief that he spent between fifteen (15) to twenty (20) hours in total on Lopez's case.

Mr. DeAngelo also testified that during this time frame he worked with the State in order to craft an acceptable plea agreement that Lopez would accept. Lopez did accept the plea agreement and did enter a plea of guilty after having consulted with DeAngelo. In addition, Mr. DeAngelo testified that he reviewed the discovery to determine if there were any viable pre-trial motions that would assist Lopez in his case and that he did not find the evidence to support the filing of any viable pre-trial motions.

The court cannot find that Lopez has asserted a specific factual claim of prejudice based on the amount of time he spent with Mr. DeAngelo during the time period in which Mr. DeAngelo was attorney of record. He makes general arguments that he was unable to discuss alternative defenses and or mitigation, however, he does not provide any specific evidence that there were viable defenses and/or evidence of mitigation that might have assisted Mr. DeAngelo in his plea negotiations with the State. In addition, the court notes that Lopez waited over four months to hire Mr. DeAngelo and did so only two weeks before the scheduled jury trial. Based



on Mr. DeAngelo's testimony, which is not contradicted on the record by Lopez, it appears to this court that Mr. DeAngelo was diligent in reviewing the discovery and facts of Lopez's case and met with him to review that information, and again after receiving a plea offer from the State. The court does not take lightly the fact that Lopez waited until what could be considered the last minute to hire an attorney to represent him. The record supports the finding that Mr. DeAngelo acted professionally and adequately represented Lopez during the time that he represented him. Finally, the court notes that at the change of plea hearing held on April 23, 2010, the court specifically and directly asked Lopez "Have you had sufficient time to review this matter with your attorney, Mr. DeAngelo?" to which Lopez responded "Yes, I have, Your Honor." (April 23, 2010 transcript, page 7, ll. 18-20). The court gave Lopez the opportunity to express his concerns about the amount of time at the change of plea hearing and was told directly by Lopez that he had adequate time with Mr. DeAngelo to discuss the plea agreement and change of plea proceedings.

Therefore the court finds that Lopez has failed to show, by a preponderance of the evidence, that Mr. DeAngelo was ineffective based on the amount of time he spent with Lopez during the approximately five weeks that Mr. DeAngelo acted as Lopez's defense attorney. In addition, the court finds that Lopez has failed to show any prejudice suffered as a result of his representation by Mr. DeAngelo in the criminal case.

William Schwartz

The court notes that the Petitioner does not appear to take issue with any actions taken by Mr. Schwartz prior to the time that the Canyon County Public Defender's office was re-appointed after Mr. DeAngelo withdrew from the action. Therefore, the court will focus its comments as to the conduct of Mr. Schwartz prior to and at the time of the sentencing hearing.

The Petitioner asserts that Mr. Schwartz did not spend adequate time preparing for the sentencing hearing and therefore, did not present all information at the time of sentencing. He testified that he spent only about a half an hour with Mr. Schwartz to review the information to be presented at sentencing and that he did not feel that Mr. Schwartz gave him an adequate opportunity to ask questions and to request that certain information be presented at sentencing. Petitioner's *Estrada* arguments will be addressed below.

Mr. Schwartz testified that his normal procedure is to wait to prepare for sentencing until he has received all the evaluations and reports, and then he would review those and ensure that the defendant received a copy. He then testified that he would make an appointment with the defendant, or go to the jail to consult with the defendant about the information after the defendant had an opportunity to review the relevant documents. He further testified that when he met with a defendant to review the sentencing documents and procedures that he would review the pre-sentence investigation report along with any evaluations with the defendant and then he would discuss with the defendant the court's procedures as well as appellate and Idaho Criminal Rule 35 rights and timelines.

In addition, the Petitioner asserts that Mr. Schwartz did not have Lopez's probation officer Rick Cedillo testify at the sentencing hearing on Lopez's behalf and that the court was not presented with the argument that Lopez should be considered eligible for rehabilitation as opposed to incarceration. Lopez testified that he sent Mr. Schwartz a letter requesting that Mr. Cedillo be contacted to testify at the sentencing hearing and/or write a progress report regarding Lopez's conduct on probation. Mr. Schwartz testified that he did not independently recall being requested to call Mr. Cedillo as a witness but agreed that he did not call Mr. Cedillo as a witness at the sentencing hearing. Mr. Schwartz testified that he has, at times, submitted to a client's

request to call a particular witness at a sentencing hearing but the decision to do so would be based on his professional opinion as to the appropriateness of doing so. He testified, as to Lopez's case, that even if he had been asked to call Mr. Cedillo as a witness, he probably would not have done so because it is unlikely that a probation/parole officer would be able to provide information to the court that would be beneficial to the defendant during sentencing and that the probation officer's input would more likely be relevant to the pre-sentence investigation stage of the criminal case. Mr. Cedillo testified that if he had been subpoenaed to the sentencing hearing that he would have testified, however, he stated that the extent of his testimony likely would have been limited to the opinion that Lopez had been complying with probation requirements and that there were no "red flags" prior to the filing of the charge at issue in the underlying criminal case.

The sentencing hearing was originally scheduled for July 12, 2010, however, at that hearing Lopez expressed some concerns to the court about his *Estrada* rights and the evaluation process. The court then continued the sentencing hearing in order to allow Lopez additional time to meet with Mr. Schwartz in order to address those issues. On July 13, 2010, when the parties reconvened for sentencing the court engaged in the following conversation with Lopez:

Court: I want to make sure, have you now had sufficient time to review the presentence investigation report with the attachments, including the GAIN assessment, the psychosexual report, psychosexual evaluation, and discussed them with your attorney, Mr. Schwartz?

Lopez: Yes I have, Your Honor.

Court: So you're ready to proceed today, sir?

Lopez: Yes, Your Honor.

Court: I see the wince in your face.

Lopez: It's just hard to have to go through this. That's all

Court: Okay. Other than the fact that you're being sentenced today, though --

Lopez: Yes, yes.

Court: --you feel that you've had adequate opportunity to access your lawyer, discuss the matter with your lawyer and prepare for sentencing?

Lopez: Yes, Your Honor.

Court: Is that correct, sir?

Lopez: Yes, that is correct.

(Transcript, July 13, 2010, page 2, ll. 23-35, page 3, ll. 1 -- 21).

Guided by the rule of law that a court will not second guess the tactical or strategic decisions of trial counsel "unless those decisions are based on inadequate preparation, ignorance of relevant law or other shortcomings capable of objective evaluation", the court does not find that the actions of Mr. Schwartz constituted ineffective assistance of counsel. *State v. Pentico*, 151 Idaho 906, 914, 265 P.3d 519, 527 (Ct. App. 2011), review denied. Mr. Schwartz was assigned to this court for a number of years and the court is very familiar with the professionalism and typical procedures of Mr. Schwartz during a criminal sentencing. The court accepts Mr. Schwartz's testimony that he prepared for Lopez's sentencing in the typical manner, that is by reviewing all the information and then meeting with Lopez to discuss the same and that he spent an adequate amount of time doing so. In addition, the court finds that even if Lopez is correct that Mr. Schwartz did not spend an adequate time preparing prior to the July 12, 2010 hearing, that the court allowed them both additional time to meet, to discuss the issues, and to come back to court prepared for sentencing the following day. In addition, the court finds that other than the argument that Mr. Schwartz did not call Mr. Cedillo as a witness, Lopez has not made a specific factual allegation that he was prejudiced by the alleged lack of preparation by

Mr. Schwartz. Therefore, the court finds that even if it was to determine that Mr. Schwartz did not spend an adequate amount of time preparing for the sentencing hearing, Lopez has failed to specify any specific prejudice suffered and the court finds that any prejudice would be outweighed by the fact that the court allowed Lopez and Mr. Schwartz additional time to meet and discuss the sentencing issues. Finally, the court notes that he allowed Lopez the opportunity at the sentencing hearing to express any additional concerns he might have prior to the court proceeding with sentencing and Lopez failed to so inform the court as shown by the above quoted portion of the sentencing hearing.

The court also finds that Lopez has failed to specifically identify the prejudice he suffered by the fact that Mr. Cedillo was not called as a witness at the sentencing hearing. First, Lopez has not provided the court with any evidence that he did inform Mr. Schwartz that he wanted Mr. Cedillo to appear as a witness. However, even if he had asked for such consideration, the court finds the testimony of Mr. Schwartz to be credible and will not second guess his determination that calling Mr. Cedillo would not have been beneficial or have an impact on this court's sentencing determination. While Lopez would like this court, in hindsight, to determine that the testimony of Mr. Cedillo might have presented testimony that Lopez was amenable to probation and/or other treatment, Lopez fails to account for the fact that this court carefully considered Lopez's criminal history, the specifics of the offense charged, as well as all the information provided in the various evaluations prepared for the court's consideration. As this court noted at the time of sentencing, and in ruling on the I.C.R. 35 motion, the court considered all relevant information and determined that the sentence imposed was proper given all the information and the offense for which Lopez was being sentenced. Therefore, the court finds that the decision not to call Mr. Cedillo as a witness was a strategic decision on the part of Mr. Schwartz and will

not be second guessed by this court. In addition, the court finds that Lopez has failed to specify any prejudice suffered in light of all the other information and argument presented to the court at the time of sentencing.

Therefore, the court denied Lopez's request for post-conviction relief due to a lack of preparation on the part of Mr. DeAngelo and Mr. Schwartz as identified above.

#### Estrada Issues

In his petitions for post-conviction relief, Lopez makes general arguments that his counsel was ineffective because Lopez was not properly informed as to his *Estrada* rights and Lopez was prejudiced because he implicated himself during the psychosexual evaluation that was prepared in anticipation of sentencing. Lopez does not specify whether these arguments are directed at Mr. DeAngelo or Mr. Schwartz and thus because Lopez was represented by both attorneys at or near the time the *Estrada* issue and the psychosexual evaluation occurred, the court must address the conduct of both in order to ensure that the issue is properly considered. The only specific allegation made by Lopez is that he did not understand that he had the right to remain silent prior to completing the psychosexual evaluation and having failed to do so made statements upon which the evaluator relied to make the recommendation that Lopez was a "moderate risk to re-offend" which impacted the sentence imposed by the court.

The *Estrada* rights arise out of *Estrada v. State*, 143 Idaho 558, 149 P.3d 833 (2006), in which the Idaho Supreme Court held that the right to counsel attaches to the psychosexual evaluation stage of a criminal case. This issue is often raised in post-conviction relief cases with the argument that trial counsel was ineffective for failing to properly advise a defendant as to his or her rights under this case authority. In *Estrada*, the Idaho Supreme Court determined that a

defendant has a Sixth Amendment right to counsel as to the decision of whether to submit to a psychosexual examination. In addition, the court held that Estrada's counsel was deficient for failing to advise the defendant that he had a Fifth Amendment right against self-incrimination during the psychosexual examination process. *Id.*, at 564, 839. In *Hughes v. State*, 148 Idaho 448, 456-57, 224 P.3d 515, 523-24 (Ct. App. 2009) review denied, the Idaho Court of Appeals determined that the Sixth Amendment right to counsel, as it relates to the psychosexual evaluation process is satisfied when counsel advises the defendant prior to the examination itself and that counsel's presence at the evaluation process was not required. The court determined that "[a]s long as appropriate advice is given prior to the examination that comports with *Estrada*, the Sixth Amendment requirement for effective assistance of counsel has been satisfied." *Id.* In addition, the *Hughes* court that the defendant's Fifth Amendment right against self-incrimination as it relates to the effective assistance of counsel is satisfied by the "by virtue of the Sixth Amendment's guarantee of effective assistance of counsel, which requires that counsel inform the client regarding the decision of whether to submit to the PSE and the right to assert the privilege against self-incrimination during the PSE." *Id.*, at 460, 527.

In this case, the Petitioner's Amended Petition states, without specifying which attorney is being implicated, that "Petitioner was not informed or understood his 5<sup>th</sup> Amendment right to remain silent prior to completing the psychosexual evaluation." He makes a similar argument in his closing memorandum in which he states he did not understand that he had the right to remain silent and while he understood that the score of the evaluation would determine what sentence he might receive, he did not know that his statements would be used to determine the evaluation of the level of his risk to re-offend.

At the Evidentiary Hearing in this case, Mr. DeAngelo testified that he discussed the psychosexual evaluation (PSE) with Lopez prior to the change of plea because the State's plea offer was dependent upon the psychosexual evaluation determination of Lopez's risk to re-offend. That is, the State's plea offer involved a staggered sentencing recommendation based on the Lopez's participation in the psychosexual evaluation and the determination of the risk to reoffend. Mr. DeAngelo testified that he informed Lopez that if he did not participate in the PSE then Lopez would not have the benefit of the plea agreement and the court would not have the information about Lopez being a threat to the community. He also testified that after taking over the case, reviewing the discovery, and discussing a plea agreement with the State, at the April 15, 2010 jail visit with Lopez, he discussed the plea agreement and the need to participate in the PSE along with what possible benefits and risks were associate with participation in the PSE. When asked by Lopez's counsel during the Evidentiary Hearing whether he informed Lopez of his right to remain silent, Mr. DeAngelo stated "I did."

In response to this argument, the State has asked the court to consider the Change of Plea hearing transcript and the court has done so. The court finds that Lopez was informed of his specific rights pursuant to *Estrada* as shown by the following:

Court: I want to advise you that you have certain constitutional rights, fifth and sixth amendment rights that continue beyond this date. And that would be the right to remain silent or maintain your right against self-incrimination, and the right to consult with or have advice of your attorney in the evaluation process that will follow this plea up until the time of your sentencing.

This is basically—we were discussing Estrada rights. It's based upon a case that we refer to as the Estrada decision. So if this court orders the psychosexual evaluation, which is part of this discussion, is part of the basis of the recommendations of sentencing, I want you to understand that you're not required to necessarily participate in the psychosexual evaluation and/or to make statements that might incriminate you with regard to other criminal offenses or may cause your sentence to — perhaps to be treated more harshly or, you know, make admissions of aggravation in this case? You understand all of that?



Lopez: Yes, Your Honor.

Court: So if there's participation in the presentence investigation and the psychosexual evaluation, you may have rights to remain silent with regard to questions asked you during the process. Do you understand that?

Lopez: Yes, Your Honor.

(Transcript, April 23, 2010, page 29, ll. 12-25, page 30, ll. 1-17.)

Court: So Mr. DeAngelo, does your client—is your client going to participate in these evaluations?

Mr. DeAngelo: He's going to participate. We did discuss his right to remain silent. We decided that, based on the plea agreement and the possibility for sentencing recommendations, and the possibility of his nonparticipation in these evaluations and sentencing recommendations, we're going to go ahead and participate."

(Transcript, April 23, 2010, page 31, l. 25, page 32, ll. 1-8).

Court: And if, for some reason, you — you understand you're waiving on the record here today these Estrada rights that have been discussed with you and you've discussed them with your attorney? Do you understand that?

Lopez: Yes I do, Your Honor.

(Transcript, April 23, 2010, page 33, ll. 2-7).

As this shows, the record before this court shows that Lopez was informed of his right to remain silent pursuant to his *Estrada* rights by his counsel Mr. DeAngelo and by this court. In addition, the above recitation shows that Lopez informed the court multiple times that he understood that he had the right to remain silent. In addition, the record shows that Mr. DeAngelo represented to the court, and Lopez agreed, that they had discussed the decision whether to participate or not in the PSE and had decided that Lopez would participate in order to take advantage of the State's staggered plea offer. Thus, the court finds that Lopez was informed of, and represented to the court that he understood, his Fifth and Sixth Amendment rights associated with participation in a psychosexual evaluation. The court finds that Lopez had effective assistance of counsel by Mr. DeAngelo as it relates to this issue.

The court does understand through Lopez's testimony that he might have felt intimidated by the court system and procedures and may have made statements that he understood his *Estrada* rights when he was really confused about the process. He also testified that he did not understand that the opinion of the psychosexual evaluator and the score of the evaluation would be taken into consideration along with statements he made during the evaluation process. Lopez stated that had he better understood the effect of the PSE that he would have asked more questions and remained silent during the evaluation process. The court recognizes and understands that the criminal justice system can be overwhelming and confusing, however, this court makes every effort to ensure that criminal defendants are both informed and aware of the various rights and responsibilities of defendants and lawyers. In this case, as shown above, the court explained the rights to Lopez and gave him both an opportunity to consult with his counsel and to ask questions of the court. Lopez was given the opportunity to inquire as to issues he did not understand. In addition, as noted above, the *Estrada* issue arose at the first sentencing date and the court continued the hearing to allow Lopez to further consult with Mr. Schwartz prior to sentencing. Therefore, the court finds that Lopez was given an adequate opportunity both to consult with his attorneys about the *Estrada* issues, to ask questions of this court, and was given additional time to ensure that he fully understood. Lopez informed this court that he understood his rights and was making the choice to participate in the PSE. The court finds that Lopez's attorneys acted properly in advising Lopez and worked as diligent advocates of Lopez to obtain a staggered plea agreement from the State that in all likelihood worked to the benefit of Lopez during the sentencing process.

The court will deny the Petitioner's request for post-conviction relief on the grounds that he was not informed of his *Estrada* rights. The court finds that he benefited from effective

assistance of counsel and that he was adequately informed by his counsel and this court of the various rights he was entitled to and was choosing to waive. The court finds that Lopez was given an adequate opportunity to consult with counsel about the rights and the impact on the plea agreement and sentencing.

#### Right to Appeal

In the *pro se* Petition, Lopez made a statement that "After sentencing my lawyer failed to inform me of my right to appeal in writing or any other communication." This assertion was not included in the Amended Petition, however, counsel for Lopez raised the issue in direct examination of Mr. Schwartz. The court will address the issue, despite the fact that it was not raised in the Amended Petition, in order to ensure that all issues are addressed by this court. Because the Petitioner did not provide specific argument or authority on the issue, the court is left to guess exactly what the claim is because it appears to the court that Lopez concedes that he was informed that he had a right to appeal but appears to argue that he didn't know how to go about appealing.

Generally, where a criminal defendant advises his or her attorney of a desire to appeal, and the attorney fails to take the necessary steps to file an appeal, such a defendant has been denied his or her constitutional right to the effective assistance of counsel at a critical stage in the proceedings. *Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). *See also*, *Flores v. State*, 104 Idaho 191, 657 P.2d 488 (Ct.App.1983). In *Beasley*, the appellate court held that when a defendant requests that an appeal be filed but one is not so filed that the defendant has been denied the benefit of counsel at a critical stage of the proceedings and that prejudice is presumed from the counsel's failure to act in filing the appeal. In *Flores*, the petitioner claimed in an affidavit that he repeatedly asked his attorney to file an appeal and that his attorney agreed

to visit Flores at the penitentiary to discuss the appeal but did not come see him and an appeal was not filed. These allegations were not denied by the attorney but the attorney argued that the defendant and his family, along with counsel determined that an appeal would not be a strategically sound decision and thus an appeal was not filed. The court remanded the matter for an evidentiary hearing to determine whether there was a specific request to file an appeal that was ignored by the attorney. *Id.*, at 491-492, 194-195. In *Loveland v. State*, 141 Idaho 933, 936, 120 P.3d 751, 754 (Ct. App. 2005), the appellate court upheld dismissal of a post-conviction claim related to counsel's failure to file an appeal because Loveland declined to present any evidence that his counsel ignored his request to file a direct appeal. Recently in *Willie v. State*, 149 Idaho 647, 649, 239 P.3d 445, 447 (Ct. App. 2010), the court found that when the petitioner failed to present any evidence at the hearing to support his claim that trial counsel failed to inform him about his right to appeal, that the district court was correct in denying the request for post-conviction relief.

At the Evidentiary Hearing, when asked Mr. Schwartz testified that he did not have any independent recollection of discussing the opportunity to appeal with Lopez. He testified that it was his normal practice to discuss the issue of appeals during the pre-sentencing conference with the defendant. He also testified that he knew that this court would always present the information to a defendant, and would require him to do the same at the time of sentencing. He testified that it was his practice to file a Notice of Appeal when requested to do so by a defendant either orally, by letter, or by telephone call. Mr. Schwartz could not recall if Lopez requested an appeal and that if Lopez had sent a letter requesting an appeal that such letter should be in the file. During his testimony, Lopez testified that he was informed of his right to appeal at the time of sentencing but was not informed by Mr. Schwartz about the process of filing an appeal and

was not sure how to proceed with that process. He stated at the Evidentiary Hearing "I may not have understood it all, I knew the option was there." This statement informs the court that Lopez's issue is not a lack of awareness of the right to appeal but an apparent confusion about how to go about the process.

The sentencing transcript shows that at the conclusion of the hearing, the court provided the defendant with a Notice to Defendant Upon Sentencing which is a document that sets forth the defendant's rights on appeal. The court provided Lopez the opportunity to consult with Mr. Schwartz about it and then further explained to Lopez that he had the right to appeal, had the right to an attorney on appeal including the right to a public defender. Lopez informed the court at that time that he understood his rights and had the opportunity to consult with Mr. Schwartz. (Transcript, July 13, 2010, page 42).

The court, in this case, is left with a bit of a quandary as to this issue because Petitioner raises the issue but fails to address it in argument and fails to support the issue with any authority, leaving the court unclear as to the Petitioner's allegation. In addition, the record is inconsistent in that Lopez seems to argue both that he was not told of his right to appeal while recognizing in this testimony that he was told, but didn't understand the process. Finally, Lopez asserts that he sent Mr. Schwartz a letter requesting an appeal but neither he, nor Mr. Schwartz have the letter or at the least, presented it as evidence to the court.

Therefore, the court, while recognizing that Lopez has the right to appeal and has the right to have an attorney file an appeal on his behalf, finds that Lopez has failed to present by a preponderance of the evidence that he actually did make a request that Mr. Schwartz file an appeal on his behalf. The court is not in the position of speculating and it is the Petitioner's burden to ensure that evidence is in the record to support his claims. The Evidentiary Hearing

was the time set forth for the presentation of evidence and the court cannot find by a preponderance of the evidence that Lopez requested an appeal be filed on his behalf. The court will not grant post-conviction relief on this issue.

Conclusion and Order

For the reasons set forth above, the Petitioner Damon Marcelino Lopez's Petition for Post-Conviction Relief is denied. A separate judgment shall be prepared and filed by the court in compliance with I.R.C.P. 54(a).

Dated: February 20, 2013.

Bradly S. Ford  
District Judge